not include business records and official records as "testimonial." *Id.* at 76. "To hold otherwise would require numerous additional witnesses without any apparent gain in the truth seeking process." *Id.*

This case demonstrates why not all declarations made with an awareness that they may be used in subsequent litigation should be considered testimonial per se. There is nothing in the declaration that can be described as believed to be incriminatory when made. Indeed, the declaration is devoid of any statement that is, in fact, incriminatory. The document is routinely prepared and records objective facts and not subjective observations. The health care professional can in no way be considered an accuser, a defamer or a person bearing prejudicial evidence against a suspected drunk driver. The health care professional's declaration certainly does not rise to the level of the ex parte examination and letter of Lord Cobham that so unjustly prejudiced Sir Walter Raleigh. These are trained professionals recording objective facts of a routine blood draw for which they will have little or no independent recollection. The health care professional certainly does not stand in the same shoes as Lord Cobham in the Sir Walter Raleigh trial.

In overruling *Ohio v. Roberts*, 448 U.S. 56 (1980), this Court stated the "unpardonable vice" of the *Roberts* case was its capacity to admit testimonial statements that the Confrontation clause meant to exclude. *Crawford*, 541 U.S. 36, 63. These testimonial statements included allowing a statement of a witness who had confessed to a related crime to be admitted, the admission of plea elocution showing the existence of a conspiracy, prior grand jury testimony and prior trial testimony. *Id.* at 64. The declaration of the health care professional is a different species. It

does not come close to the incriminatory nature of such out-of-court statements. The suspected drunk driver will always have the opportunity to cross examine the police officer that made the traffic stop, made the subsequent DUI arrest and witnessed the blood draw. The police officer will obviously be available for cross-examination regarding their observation of the suspected drunk driver, the odor of alcohol, driving conduct and the results of field sobriety tests. The chemist or expert that examined the blood sample for the presence of alcohol or controlled substances will be cross-examined. The chemist or expert will be available for cross examination regarding the sample tested and the methodology utilized for the test. Within the four corners of the declaration, the health care professional is merely an objective person who obtained a blood sample for later analysis, whether such results favor the suspect or the prosecution.

The health care professionals involved in these cases are trained professionals whose employment depends on ensuring accuracy in the performance of their duties. Chief Justice Rehnquist recognized in *Crawford*, as the Nevada Supreme Court did in *DeRosa v. First Judicial District Court*, 115 Nev. 225, 985 P.2d 157 (Nev. 1999), that the usefulness of cross-examination as a truth finding tool is very limited with respect to certain witnesses. "[I]n a given instance [cross examination may] be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross examination would be a work supererogation." *Crawford*, 541 U.S. 36, 74-75.

Since this Court's decision in *Crawford*, state and federal trial courts have, by necessity, undertaken the task

of defining which evidence is testimonial or non-testimonial in nature. In *State v. Dedman*, 136 N.M. 561, 102 P.3d 628 (2004), the Supreme Court of New Mexico found that a blood alcohol report was non-testimonial. It did so by analyzing the report as addressing a routine process and further characterized the report as "non-adversarial" and "made to ensure an accurate measurement." *Dedman*, 136 NM 561, 569, 102 P.3d 628, 636. It also recognized that the blood alcohol report was very different from other examples of testimonial hearsay evidence such as prior testimony at a preliminary hearing before a grand jury or police interrogations. *Id.*

Numerous other state courts have reached different conclusions as to whether certain records and reports made with the knowledge of possible use in litigation are testimonial hearsay and thus subject to the Confrontation Clause and *Crawford* analysis. A select few are: *People v. Johnson*, 121 Cal.App. 4th 1409, 18 Cal. Rptr. 3d 230 (2004) (holding that lab reports in a probation revocation hearing are routine and non-testimonial documents); *People v. Kanhai*, 8 Misc.3d 447, 797 N.Y.S.2d 870 (2005) (holding that certified intoxilizer test results are business records and do not violate right to confrontation); *People v. Durio*, 7 Misc.3d 729, 794 N.Y.S.2d 863 (N.Y. 2005) (holding that autopsy reports are business records); *Smith v. State*, 898 So.2d 907 (Ala.Crim. App. 2004) (holding that admission of autopsy reports, without testimony of medical examiner who performed autopsy, violated defendant's Sixth Amendment right to confrontation).

This Court's decision in *Crawford* did not create a litmus test for characterizing evidence as "testimonial" merely because the document may later be used in litigation. If this were the case, in today's well recognized

litigious society, virtually all records would be testimonial in nature because of the potential for the document to be later utilized *in some manner* at trial.[1] Documents believed to be used in subsequent litigation should only be considered "testimonial" if they were perceived or should have been perceived as accusatory.

The health care professional withdrawing a sample of blood is a qualified professional that is merely memorializing their qualifications and the manner in which the blood was drawn. At the time that the declaration is completed by the health care professional, the declarant is not assured that the document will be used in a criminal prosecution. The contents of the declaration are objective, non-incriminatory, non-accusatory and record routine medical procedures. As such, this declaration is non-testimonial in nature.

B. NRS 50.315(4) Adequately Preserves a Defendant's Constitutional Right to Confront Witnesses by Providing a Statutory Confrontation Mechanism.

In *Walsh II*, the Nevada Supreme Court held that NRS 50.315(6) adequately preserves a defendant's right to cross-examine the health care professional:

> Nothing in *Crawford* compels us to overrule the waiver language in *DeRosa*. The essence of *Crawford* is the need for cross-examination. If

[1] This would include medical records that could potentially be used in a medical malpractice suit, accounting or audit reports that could be later used in criminal or administrative proceedings relating to non-payment of taxes. Indeed, virtually any document generated by a public or private entity may potentially be used in litigation and would thus fall into the category of being "testimonial."

> defense counsel has no bona fide dispute regarding the facts in an affidavit and credibility of an NRS 50.315 declarant, then cross-examination is meaningless. It serves no purpose to have a witness appear if no questions will be asked on cross-examination. Therefore, we are convinced that NRS 50 315 adequately preserves the constitutional right to confront witnesses against a defendant by providing a statutory confrontation mechanism. Any finding or waiver and admission of the affidavit would be subject to a harmless error review on appeal. *Walsh II*, 124 P.3d 203, 208 (2005).

In *DeRosa v. First Judicial District Court*, supra, the Nevada Supreme Court recognized that the presence of the health care professional may do little to further the truth finding process because these witnesses may have little or no recollection of a routine procedure that had been conducted months before.[2] In his concurring opinion in *Crawford*, Chief Justice Rehnquist acknowledged the necessity for materiality in the testimony in relation to effective and substantive cross-examination. He characterized cross-examination as "a tool used to flesh out the truth, not an empty procedure." *Crawford*, 541 U.S. 36, 74. Chief Justice Rehnquist also recognized that cross-examination is a "functional" right designed to promote reliability in the truth finding functions of a criminal trial and that "[I]n a given instance [cross-examination may] be superfluous; it may be sufficiently clear, in that instance

[2] "Finally, the usefulness of live testimony would be questionable in that the affiants and declarant may lack specific independent recollection of the individual circumstances surrounding each routine act." 115 Nev. 225, 233, 985 P.2d 157, 162.

that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation." *Id.* at 75, citing *5 Wigmore* § 1420 at 251.

NRS 50.315(6) merely requires that a defendant make a good faith offer of proof that a fact of consequence to the litigation is more likely to be proven or disproven by the presence of the health care professional. This is merely a showing of materiality of the cross-examination; a defendant must point out that there is a good faith question of fact relating to the contents of the declaration of the health care professional that can be answered by the actual presence of the witness. As pointed out by the Nevada Supreme Court, Gehner did not contest the validity of any fact contained in the declaration. NRS 50.315(6) only requires that a defendant have a good faith and bona fide issue with the objective and non-incriminatory facts contained in the declaration of the health care professional such that it is in the best interest of justice to require their presence.

CONCLUSION

Gehner is seeking interlocutory review relating to the admissibility of the declaration of the health care professional before the case has come to trial or has otherwise been concluded. The declaration of the health care professional does not contain any accusatory or incriminatory information and is merely an objective statement of facts relating to the manner in which a blood sample was obtained. As such, this declaration is non-testimonial. In addition, NRS 50.315(6) adequately protects a defendant's

confrontation right by allowing the trial court to require an offer of proof from a defendant to show there is a good faith and material basis to contest the facts contained in the declaration and thereby ensuring effective cross-examination on a material issue. Notwithstanding the City's position that the non-accusatory declaration of the health care provider is not testimonial in nature, the City respectfully requests that this Court deny the Petition for Writ of Certiorari because 1) Gehner's request for interlocutory relief is not appropriate for review by this Court, and 2) the Nevada Supreme Court correctly concluded that NRS 50.315 preserves the Sixth Amendment right to confront witnesses against a defendant by providing a statutory confrontation mechanism.

Respectfully submitted,

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APPENDIX 1

DECLARATION FOR THE
WITHDRAWAL OF WHOLE BLOOD SAMPLE

STATE OF NEVADA)
) ss
COUNTY OF CLARK)

EVENT #: 010522-0202

Dorothy Keefe, says:

THAT I AM A ☑ Registered Nurse ☐ Nurse Practitioner
☐ Licensed Practical Nurse ☐ Medical Doctor
☐ Laboratory Technician/Assistant ☐ Other (specify) _____
☐ Emergency Medical Technician
☐ Physician Assistant

employed by RHS EMSA CORRECTIONAL CARE
That a regular part of my duties is the withdrawing of blood samples from persons and I am authorized to do so by NEVADA STATE BOARD OF NURSING (THE APPROPRIATE LICENSING OR CERTIFYING AGENCY):

That on May 22, 2001, at 0337 AM/PM, I withdrew a sample of blood in a medically accepted manner from a person known to me as: Gehner Michael

and

That I withdrew the sample using no alcohol solutions or alcohol-based swabs; and;

That I kept the sample of blood in my sole custody or control and it remained in substantially the same condition as when I first obtained it until on May 22, 2001, at 0337 AM/PM I delivered the sample to Officer Pacifico P #: 6511 of the LAS VEGAS METROPOLITAN POLICE DEPARTMENT

(agency). I Dorothy Keefe (PRINT DECLARANT'S NAME) DO HEREBY DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

/s/ Dorothy Keefe
Declarant's Signature

RN — 5/22/01
Title — *Date*

/s/ V. Pacifico 6511
Witness' Signature

05-22-01

APPENDIX 2

NAC 50.055
Nev. Admin. Code ch. 50, s. 055

NEVADA ADMINISTRATIVE CODE
CHAPTER 50. WITNESSES

Current through
December 31, 2005, Supplement 2005-6

NAC 50.055 Form of **declaration** regarding **withdrawal** of **sample** of **blood**. (NRS 50.315)

A **declaration** referred to in subsection 4 of NRS 50.315 must be in substantially the following form:

I, _____, hereby **declare:**

That I am a _____ (occupation) employed by _____ (employer);

That a regular part of my duties is the **withdrawing** of **blood samples** from persons and I am authorized to do so by the _____. (name of appropriate licensing or certifying agency);

That on _____ (date) at ____ o'clock _____m., I **withdrew** a **sample** of **blood** in a medically accepted manner from a person known to me as _____(name); and

That I kept the **sample** of blood in my sole custody or control and it remained in substantially the same condition as when I first obtained it until on _____ (date) I delivered the **sample** to _____ (name of person) of the _____ (name of law enforcement agency).

I **declare** under penalty of perjury that the foregoing is true and correct.

Executed on _____ _____
(Date) (**Declarant's** Signature)

_____
(**Declarant's** Title)

(Added to NAC by Com. on Testing for Intoxication by R112-97, eff. 5-26-98)